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Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses

Richard L. Williamson, Jr.*

I. INTRODUCTION

Perhaps the single most important issue concerning the role of law in arms control¹ is whether parties are more likely to comply² with the fundamental

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¹ No effort is made here to distinguish arms control from disarmament, though distinctions are possible. More significant is to differentiate arms control from two related subjects, viz., from peace treaties and cease-fire agreements containing provisions for demilitarized zones or other arms limitations, and from humanitarian law. The former includes the Rush-Bagot Agreement of 1817 between the US and Britain that restricted the number and weaponry of warships on the Great Lakes and Lake Champlain; the 1955 Multilateral Austrian State Treaty, 6 UST 2369 (1955); the 1990 Treaty on the Final Settlement With Respect to Germany, 1696 UNTS 115 (1991); and the Egyptian-Israeli Peace Treaty, reprinted in 18 ILM 362 (1979). These agreements are similar to arms control in that they limit the number, armament, and/or location of military forces. But nations often have incentives to comply with peace agreements that differ considerably from the kinds of incentives that may apply to instruments more widely considered arms control. Humanitarian law (*jus in bello*, generally considered a subset of the laws of war) limits the means and circumstances under which arms can be used, with the clear implication that other uses are proper. Humanitarian law, as its name implies, is largely designed to protect the civilian population and avoid needless suffering among combatants. It forbids the use of some arms entirely or controls the circumstances of their use. Arms control, in contrast, goes beyond use limitations to prohibit manufacturing, testing, transfer, and/or possession of weapons systems, or to constrain their number and location. Its purposes are above all to contribute to international peace by reducing nations' concerns over the number, type, and placement of weapons—particularly those thought to be of strategic significance or otherwise destabilizing—in the hands of other countries. This distinction leaves some gray areas, such as the ban on any use of chemical or biological weapons under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 26 UST 571 (1975) (hereinafter Geneva Protocol); the ban on the use of environmental modification techniques under the Convention on the Prohibition of Military or Any Other

obligations of a binding treaty instrument, than comply with a norm they have indicated support for, but to which they are not legally bound.

Concluding arms control treaties does not guarantee compliance; this should be obvious from the fact that several important multilateral arms control agreements have been violated. Moreover, the violations were not mere paperwork errors or delays in implementation, but were violations of the very object and purpose of the treaties. The Soviet Union, we now know, made large amounts of biological agents for weapons, in violation of its obligations as a party to the Biological Weapons Convention ("BWC").³ Iraq violated the 1925 Geneva Protocol, to which it had been a party since 1931, by its extensive use of chemical weapons against Iranian forces during the Iran-Iraq war.⁴ Iraq and North Korea have both clearly violated the essence of the Nuclear Nonproliferation Treaty ("NPT")⁵ by establishing programs aimed at acquiring nuclear weapons, and by possessing significant nuclear materials and equipment without complying with the inspection system ("safeguards") of the International Atomic Energy Agency ("IAEA").⁶

Hostile Use of Environmental Modification Techniques, 31 UST 333 (1979) (hereinafter Environmental Modification Treaty or ENMOD); and the ban on the use of blinding laser weapons under Protocol IV of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (hereinafter CCW), available online at <<http://www.unog.ch/frames/disarm/distreat/ccwprot4.pdf>> (visited Mar 9, 2003). This Article makes the somewhat arbitrary choice of putting the Geneva Protocol and the Environmental Modification Treaty into the category of arms control, and the CCW in the humanitarian law category.

² For a discussion of what compliance means and its relationship to the related but different concepts of implementation and effectiveness, see Peter M. Haas, *Why Comply, or Some Hypotheses in Search of an Analyst*, in Edith Brown Weiss, ed, *International Compliance With Nonbinding Accords* 21, 21–23, Stud Transnat Legal Poly No 29 (ASIL 1997). See also Abram Chayes and Antonia Chayes, *On Compliance*, 47 Int Org 175 (1993).

³ See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 26 UST 585 (1975).

⁴ Both states were parties to the Geneva Protocol, and its prohibition on the use of poisonous gases was thus applicable to that war. Saddam Hussein's use of chemical weapons against his own citizens in the Kurdish regions did not violate the terms of the Geneva Protocol, given Iraq's reservation at the time of accession that it was bound only with respect to other states party to the Protocol. However, it was, of course, a clear violation of customary international law.

⁵ Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1970).

⁶ Recent revelations also indicate probable additional violations of the NPT and of North Korea's safeguards agreement with the IAEA, and of the 1991 and 1994 agreements concerning the nuclear situation on the Korean peninsula. North Korea has subsequently denounced its adherence to the NPT. Whether there have been new Iraqi violations of the NPT, the Biological Weapons Convention, and/or the UN Security Council's resolutions on biological, chemical and nuclear weapons should become clearer as a result of inspections and the current conflict in Iraq.

While the record of compliance with arms control treaties is far from perfect, it is statistically quite good. The incidents listed above are the only confirmed violations of the object and purpose of a multilateral arms control treaty. There has been one suspected violation of the Limited Test Ban Treaty ("LTBT") and a number of suspected violations of the Geneva Protocol and the BWC.⁷ Moreover, there have been many minor violations involving reporting requirements, compliance deadlines, and other less strategically significant provisions. Still, major violations of treaty obligations are the exception rather than the rule, and the overall compliance record in arms control is a good one.

Multilateral arms control agreements, and actions that might be taken pursuant to them, are among the few ways the international community can attempt to keep the world from becoming increasingly dangerous as the economic and technical capacity to produce and deploy highly lethal weaponry inevitably spreads.⁸ As the alternatives to arms control either appear unrealistically optimistic or are likely to make things worse, it is hardly quixotic for the international community to negotiate arms control agreements, and to put forth considerable efforts to nurture and improve the resulting legal regimes, in the belief that most countries will comply most of the time.

This Article sets forth some of the issues that arise in assessing compliance in the arms control field, but with primary emphasis on multilateral arms control. It then poses hypotheses concerning compliance with multilateral arms control measures that seem to be suggested by the compliance record, and which may merit further investigation. Finally, it concludes with some preliminary observations on what arms control compliance may suggest for international law and international relations theory.

II. ISSUES RELATED TO COMPLIANCE

While compliance per se is a vital issue, it is hardly the only important question concerning the role of law in arms control.⁹ Other matters can affect a

⁷ There have been a number of incidents in the areas of arms control and humanitarian law involving allegations of the use of chemical or biological weapons, including Japanese use of poisonous gas in China during World War II, Egyptian use of mustard gas in Yemen in the early 1960s, the "yellow rain" dispute concerning Laos, the possible use of mind-altering chemicals on Moslems retreating from Srebrenica during the civil war in Bosnia, and the likely poisoning of wells and food by the white minority government in Rhodesia.

⁸ That is not to say that multilateral arms control regimes are the only such measures. As discussed in this Article, there are non-law measures, and also the possibility, applied so far only in Iraq, of action by the UN Security Council under Chapter VII of the UN Charter.

⁹ To be sure, compliance with treaties and other international measures is important in many aspects of international relations, not just arms control. Indeed, a great deal has been written on the question of why countries comply with their international law duties. For a few examples, see notes 2, 15, 47–54. Still, it may be worth considering the possibility that the field of arms control, which is a sub-branch of international law generally, might be

treaty's effectiveness, such as the degree to which essential nations become parties to the treaty. If key parties remain outside the treaty, it increases pressure on the other states to withdraw or to cheat. This was one of the main difficulties with the pre-World War II Naval Agreements (to which Germany was not a party) and is the single largest weakness of the NPT regime, as India, Pakistan, and Israel remain nonparties.

Another important matter that impacts on compliance is the clarity of the instrument. This was a major problem leading to disputes between the US and the Soviet Union over the LTBT,¹⁰ and the controversy of whether Iraq violated the Environmental Modification Treaty ("ENMOD") during the Persian Gulf War.¹¹

The wisdom of the treaty provisions may also be critical to the effectiveness of the treaty and to states' compliance. In retrospect, Article I of the NPT should not be limited to the nuclear weapons states. Instead, all parties should have a duty to in no way encourage or assist another state to acquire nuclear weapons. Similarly, lack of any inspection and verification system under the BWC was, in retrospect, an error.

Other treaty provisions, such as those dealing with reporting, investigation, corrective action, dispute resolution, sanctions, and withdrawal, can also have an important effect on compliance, though a discussion of them is beyond the purposes of this Article.

III. HARD LAW, SOFT LAW, AND NON-LAW

Arms control efforts embrace a wide variety of measures. These include "hard law" norms contained in treaties, which are binding international law,¹² nonbinding instruments commonly referred to as "soft law," and measures that meet no conceivable definition of international law, such as a unilateral or

somewhat different, or even significantly different, from some other sub-branches, particularly given that arms control touches on states' fundamental concerns with their security. Of course, virtually all states can be expected to break their commitments if they believe their national survival is at stake. But concerns for their security often have the opposite effect, encouraging states to cooperate in finding peaceful solutions. Moreover, states are likely to take a particularly dim view of other states breaking their commitments in the security field, tending to make states cautious about doing so for fear of retaliation or other adverse consequences.

¹⁰ See note 29.

¹¹ There has been some discussion of whether Iraq's dumping of oil and torching of large numbers of oil fields in Kuwait were violations of ENMOD, but the point is probably not worth debating in the abstract, as it is beyond quibble that those actions were violations of customary international law. For a discussion of the Iraq/Kuwait/ENMOD question, see Bernard H. Oxman, *Environmental Warfare*, 22 *Ocean Dev & Intl L* 433 (1991).

¹² Very little in the arms control field could reasonably be considered customary international law, though, of course, such customary international law norms as might exist in the field would be "hard law."

mutual restraint from obtaining certain weapons where there is no agreement to do so.¹³ Trying to understand the role of law in arms control requires one to take these distinctions into account.

Much of the interest in these categories stems from an appreciation of the growing importance of soft law in other branches of international law, including international environmental law and human rights. As the term is commonly used, soft law consists of instruments that are not binding but are nevertheless declaratory of aspirational norms of international behavior.

Documents creating soft law include instruments subordinate to a treaty that are not per se binding but that support the purposes of the treaty regime; unanimous or virtually unanimous resolutions of the United Nations General Assembly ("UNGA") and other international organizations, on legal topics which purport to declare or codify legal obligations or establish new legal norms; and finally, understandings that in an earlier era were called "gentlemen's agreements"—treaty-like instruments understood by the parties not to create legal obligations.¹⁴

Diplomats and their governments sometimes prefer concluding soft law instruments because doing so can be easier than adopting treaties. Soft law instruments are advantageous because they avoid constitutional and other domestic legal requirements in most democracies for entry into force that apply to treaties. Another commonly cited advantage is the very fact that soft law is nonbinding, making it easier to induce a reluctant state to become a party, and overcoming a state's fears that it might be committing itself to a course of conduct when future circumstances are hard to foresee.

The growing use of soft law has led to the following line of inquiry: if compliance with these soft law instruments is as good, or nearly as good, as compliance with treaties or other forms of hard law, might it not be advantageous to encourage their greater use? Efforts to assess compliance with soft law norms and to compare the results to compliance with hard law have

¹³ This latter category does not have a common term in the international law and international relations jargon. For the purposes of this Article, such measures will be termed "non-law."

¹⁴ There are two other arguable categories of soft law. The first consists of treaties that do not come into force, for whatever reasons, but which seem to reflect a very widespread consensus. In the author's view, this is not soft law, but rather, a hard law effect arising from the interplay of the core duty of the treaty and the narrow duty of Article 18 of the Vienna Convention on the Law of Treaties, reprinted in 8 ILM 679, 686 (1969) (hereinafter Vienna Convention), which obligates those states that have ratified a treaty not to engage in acts prior to its entry into force that would defeat the object and purpose of the treaty. The other arguable category of soft law consists of provisions in an otherwise binding treaty that are hortatory or aspirational, or are otherwise understood by the participants to represent a political or moral commitment, but are nonbinding at law. Little in arms control seems to depend on whether one thinks of this category as a subset of soft law or just very mushy hard law.

been only partially successful, though the assessment process has revealed much of value.¹⁵

Meanwhile, state actions that are not, in any sense of the word, a species of international law have been somewhat overlooked.¹⁶ Arms control examples include unilateral peaceful but coercive measures, such as US sanctions against India and Pakistan after they detonated nuclear devices in 1998; a host of diplomatic, political, and economic cooperative measures (intelligence sharing, mutual assistance in halting certain kinds of exports relating to weapons of mass destruction and their delivery systems, and financial aid to foster dismantling of particular capabilities); and finally, unilateral or parallel restraint measures that involve no actual agreement, in which countries either avoid acquiring particular weapons, or avoid deployments of them that might be considered provocative.¹⁷ For our purposes, “compliance” with most non-law activities is impossible to assess, because there is no agreement with which one is or is not complying. There is an exception when there has been a national declaration, as happens with some measures of unilateral or parallel restraint. Assuming adequate information, compliance with such a declaration can then be assessed.

IV. THE DIFFERING ROLE OF LAW IN MULTILATERAL AND BILATERAL ARMS CONTROL

The role of law in fostering compliance may be quite different in bilateral arms control than in multilateral arms control. Bilateral nuclear arms control is virtually synonymous with the unique case of arms control between the US and the Soviet Union.¹⁸ The most significant factor was the very real possibility of

¹⁵ Among the most important of these efforts are two studies done under the auspices of the American Society of International Law, and supported respectively by the National Science Foundation and the Ford Foundation, viz, Weiss, ed, *International Compliance With Nonbinding Accords* (cited in note 2), and Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford 2000).

¹⁶ That these actions or abstinence from action are neither treaties nor soft law under international law does not, of course, preclude the possibility that they can have legal effects on international law even when not legally binding, such as estoppel, or as a judicial assumption of intent to comply, as happened in the *Nuclear Test Cases (NZ v Fr)*, 1974 ICJ 457 (Dec 20).

¹⁷ One might arguably also include the use of force to halt the development of a weapon of mass destruction or a relevant delivery system by a hostile state, such as the 1981 Israeli bombing of the Osiraq reactor or the 1990 assassination in Belgium of Canadian Gerald Bull, developer of Iraq’s “supergun program,” reportedly by the Mossad. But while the use of force outside the framework of the UN Charter to deal with a particular threat caused by an arms program in another country may help deal with a particular risk, calling such actions arms control measures, when arms control is normally thought of as a means of helping to maintain the peace, seems doubtful terminology.

¹⁸ The most important bilateral undertaking outside the US–Soviet context is the *Agreement Between the Republic of Argentina and the Federative Republic of Brazil for the Exclusively Peaceful Use of Nuclear Energy*, IAEA Doc No INFCIRC/395 (Nov 15, 1995), which led ultimately to IAEA

mutual destruction of both nations and their allies by thousands of thermonuclear weapons that could be delivered by intercontinental bombers and missiles in very short time periods. That has never been the situation facing any other pair or group of countries. Managing the bilateral relationship, including its arms control aspects, became a matter of urgency that few other issues could rival. Large-scale cheating could severely upset the strategic balance, possibly leading to nuclear war; moreover, large-scale cheating ran a high risk of being discovered given the extraordinary intelligence resources on both sides. In contrast, small-scale cheating, though very hard to detect, had very little strategic utility in the US–Soviet context because the nuclear arsenals were so vast, and because deterrence depended largely on the other side knowing your capabilities. Those facts made effective strategic arms limitations highly verifiable by national means, and thus considerably more feasible than many other forms of multilateral arms control. The negotiating process was also facilitated by the two sides being more or less evenly balanced in strategic arms, which made “parity” a principle both could accept in guiding their negotiations. This allowed the negotiations to avoid the severe problems that asymmetrical arms limits have posed for the negotiation of multilateral arms limitations regimes that did not ban weapons but only limited their numbers, such as the prewar Naval Accords, or the Conventional Forces in Europe Treaty (“CFE”).

Another important difference between multilateral and bilateral arms control derives from the nature of the agreements. While the ancient principle of *pacta sunt servanda* (treaties must be complied with) applies to bilateral and multilateral agreements alike, differences in the nature of treaties can have consequences for compliance. In international law, it is a commonplace observation that treaties perform functions that several instruments perform in domestic law. Treaties may function as constitutions that set the basic framework of the legal order, statutes that set forth norms of conduct, and contracts that govern the relations between two parties but rarely of anyone else. In keeping with that analogy, treaties setting forth arms control provisions between the US and the Soviet Union were more closely analogous to contracts than to statutes. The primary reason there was effective compliance was politico-military: both sides were greatly concerned as to what the other party would do in the event that it came to believe that there had been a breach.¹⁹ Of course, the

safeguards on all nuclear facilities in the two countries. See Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 Cornell Int L J 72, 85 n 48 (1995).

¹⁹ That did not mean there were no other factors. One was the need, especially in the Soviet Union, for the political leadership to retain the support of the military. Another was the opinion of third parties and their publics, especially in Western Europe. Also important for the US were the opinion of its own public and the effect of noncompliance by either side on the US Congress.

consequences of a treaty breach and the other party's right to retaliate, for example, are legal issues. However, countries also need to worry about retaliation and other consequences when nonbinding political accords are broken. Thus, it seems unlikely that a concern for international law per se was a major independent variable. Of course, there is no way to know how often US and Soviet leaders thought, "I can't do that, even though it would be in the national interest and I would have domestic and international support for doing so, as it would be illegal."²⁰ Available information hints that international law was not an important factor.²¹ In short, while international law was relevant,²² compliance was achieved primarily because of concern for what the other side might do, regardless of the legalities. Put differently, the results would likely have been similar if humans had never invented the concept of international law.

Multilateral arms control treaties, in contrast, are more closely analogous to statutes in domestic law, creating (or codifying) norms of general applicability. In this respect, multilateral arms control regimes seem to operate more like other international legal matters. Thus, a highly complex regime like the nuclear nonproliferation regime functions somewhat like the regimes for Antarctica or for international finance. The NPT seems less similar to the bilateral US-Soviet Intermediate Nuclear Forces ("INF") Treaty in terms of the role of law,

²⁰ No effort has been undertaken, to the author's knowledge, to examine all of the relevant US and Soviet leaders concerning the occasions when critical decisions were taken, on whether compliance with law was a major motivating factor when compared with concerns about retaliation, or the military risk of the situation spinning out of control. Several of the most important national leaders are dead or unwilling to speak. Autobiographies are notoriously self-serving, and even where former officials strive for accuracy, selective memory and self-deception are among the things that humans do very well.

²¹ The author's own experience in eight years of arms control work in the State Department and the Arms Control and Disarmament Agency was that among working level officials, international law itself was very rarely discussed in the context of arms control, nor did we once get the feeling that our senior officials took the matter more seriously than we did. This did not mean that treaties were unimportant; to the contrary, a great deal of effort went into negotiating them and then fostering the subsequent treaty regimes they established. However, my colleagues who worked on bilateral arms control did not spend much time worrying about whether compliance was primarily due to *opinio juris* or because both sides were frightened of the military and diplomatic consequences of noncompliance. To the extent they did, it was clearly the latter.

²² The fact that doing so would be contrary to the Anti-Ballistic Missile ("ABM") Treaty was apparently a factor in the unwillingness of the Congress to fund certain "Star Wars" programs desired by the Reagan administration. How much was due to the Congress caring about the violation of international law and how much was due to a Democratic-controlled Congress perceiving a political advantage is impossible to say. A related example was the decision of President Bush in 2001 to withdraw from the ABM Treaty in accordance with its terms, thus acting lawfully, when there was pressure to violate the Treaty.

notwithstanding the fact that the INF Treaty and the NPT both deal with nuclear arms.²³

V. TYPES OF MEASURES USED FOR MULTILATERAL ARMS CONTROL

The international community has not seen fit to make extensive use of soft law in the arms control field. Instead, it has resorted primarily to hard law instruments, mostly global in scope, negotiated with the blessing of the UN General Assembly through the Conference on Disarmament ("CD") and its predecessors. There are also important regional arms control agreements, including the CFE, and several nuclear-weapon-free zone treaties ("NFZs").²⁴ Soft law has been used in a few cases in multilateral arms control, including the Nuclear Suppliers Group ("NSG"), the Missile Technology Control Regime ("MTCR"), the Australia Group, the Wassenaar Accord, and the Confidence Building Measures of the Helsinki Accords, all of which look like treaties, but which are regarded by the parties as nonbinding.²⁵ However, soft law remains far less common than hard law instruments in the arms control field.

²³ For a brief discussion of regime theory in the arms control context and the differences between simple legal regimes and complex regimes, see Williamson, 28 Cornell Int'l LJ at 117–18 (cited in note 18). See generally Abram Chayes and Dinah Shelton, *Commentary*, in Shelton, ed, *Commitment and Compliance* 521 (cited in note 15).

²⁴ The NFZs that have come into force to date are the Treaty of Tlatelolco, the Treaty of Rarotonga, and the Bangkok Treaty, which establish nuclear-weapon-free zones respectively for Latin America, the South Pacific, and South-East Asia. See Treaty of Rarotonga (1986), available online at <<http://www.opanal.org/NWFZ/Rarotonga/rarotonga.htm>> (visited Mar 9, 2003). Treaties for NFZs not yet in force have also been negotiated for Africa and Central Asia.

²⁵ After extensive secret meetings, the member states of the NSG negotiated a set of guidelines, *Communication Received From Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc Nos INFCIRC/254 (Feb 1978) and INFCIRC/254/Rev 1 (July 1992), to limit exports to non-NPT parties, to limit export of particularly sensitive nuclear technology to anyone, and (later) to permit exports only to states that had all of their nuclear facilities under IAEA safeguards. The MTCR similarly seeks to control the export of longer-range cruise and ballistic missiles and associated missile and space technology to states of proliferation concern. See *Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles*, reprinted in 26 ILM 599 (1987). The Australia Group was formed in 1984 in the wake of the use of chemical weapons in the Iran-Iraq war, with the objective of improving controls on chemical weapons and related chemicals and technologies. For more details, see US Dept of State, *Fact Sheet—Australia Group*, available online at <<http://www.state.gov/t/np/rls/fs/2001/3528.htm>> (visited Mar 9, 2003). The Wassenaar Accord is the replacement for the former COCOM, redirected from keeping militarily useful civilian goods out of the hands of the communist nations, and instead intended to keep dual-use technologies from states of proliferation concern. See Jamil Jaffer, Development, *Strengthening the Wassenaar Export Control Regime*, 3 Chi J Int'l L 519, 521 (2002). The Helsinki Accords provided for Confidence Building Measures such as observers at military exercises. See *Conference on Security and Cooperation in Europe: Final Act*, reprinted in 14 ILM 1292, 1298 (1975). The 1986 Stockholm Agreement went further and expanded the

It is difficult to believe that the entire international community was wrongheaded, pushing pointlessly for the extensive use of hard law instruments when soft law would have sufficed. That suggests that there are advantages to hard law. The advantage that would seem to matter most is that there would be better compliance with a hard law instrument.²⁶ Indeed, virtually all of the relevant players in the efforts to ban landmines, including governments and nongovernmental organizations, considered and rejected a soft law solution, primarily on compliance grounds. However, in assessing the likely mix of soft and hard law in future arms control endeavors, two cautionary notes should be sounded. First, there is some evidence that the resort to soft law is increasing in the arms control field.²⁷ Second, the pace of agreement on hard law instruments at the CD has slowed considerably. That may mean that proponents of soft law are correct, that hard law instruments have become too hard to negotiate and thus too cumbersome to be useful.

VI. COMPARING SOFT AND HARD LAW COMPLIANCE: THE IMPROBABILITY OF PROOF

There are severe obstacles to a rigorous assessment of the relative compliance pull of binding hard law instruments when compared with nonbinding soft law in the multilateral arms control context. Above all, even

number and type of maneuvers that required notification and provided for nonbinding challenge inspections. See *Document of the Stockholm Conference on Confidence and Security Building Measures and Disarmament in Europe* (Jan 17, 1984–Sept 19, 1986), available online at <http://www.state.gov/www/global/arms/bureau_pm/csbm/stockholm_1986.html> (visited Mar 30, 2003).

²⁶ The situation is very roughly the same in bilateral arms control, where most instruments are hard law treaties, but have been supplemented by non-law or occasionally soft law. Examples include the de-targeting agreement (soft law); the decision of both countries unilaterally to abide by the SALT I Interim Agreement after it had expired (soft law); the decision of both to cease producing highly enriched uranium (parallel restraint); the decision of the US to cease carrying its tactical nuclear weapons on board warships (unilateral restraint); or the decision of President Bush in 1991 to withdraw all tactical nuclear weapons from South Korea, followed eight days later by a similar decision by President Gorbachev to do the same from North Korea (parallel restraint, though undertaken in the spirit of the 1990–91 Presidential Nuclear Initiatives, which are soft law).

²⁷ One recent example is the July 2001 soft law agreement on small arms transfers. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, UN Doc No A/CONF/192/15 (2001). An even more recent example was the successful UN-sponsored effort at The Hague to develop a nonbinding “Code of Conduct” for missile programs and for missile-related transfers. See *Statement on the Launching of the International Code of Conduct Against Ballistic Missile Proliferation* (Nov 25, 2002), available online at <<http://disarmament.un.org/wmd/sgstatement%20icoc.htm>> (visited Mar 30, 2003).

assuming we had a common conception of compliance,²⁸ we are unlikely to be able to *prove* any propositions as to the relative likelihood that nations will comply with nonbinding norms or with binding legal obligations in the arms control field. Among the most important obstacles:

- There is little chance of ever finding two arms control cases that are identical, except that a hard law instrument is used in one case, and only soft norms are involved in the other. The closest appears to be the norm against the export of antipersonnel landmines, which is the subject both of widely supported UNGA resolutions (soft law), and a binding obligation under the Ottawa Landmines Treaty (hard law).
- There can be substantial difficulties in determining whether an alleged violation is true noncompliance, or is the consequence of ambiguity as to the content of the norm.²⁹ This problem is exacerbated by the unwillingness of parties in this field to resort to judicial resolution of their disputes, which would allow a neutral decisionmaking body to provide authoritative answers to such questions.
- Hard data on compliance are often unobtainable and/or subject to debate. This problem is not unique to arms control, but it is rendered considerably more difficult by the secrecy that usually surrounds the military security assets of nations.
- Compliance with some arms control norms may be difficult or impossible, while compliance with others is exceptionally easy.³⁰ It is only when a state has both an incentive to violate a norm and the

²⁸ For some of the difficulties, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, in Weiss, ed, *International Compliance With Nonbinding Accords* 49 (cited in note 2).

²⁹ For example, due to a difference in the translations of the word "debris" in Article I, paragraph 1(b) of the Limited Test Ban Treaty, the US took the view that any radiation released from an underground nuclear test that crossed an international border was a violation, whereas the Soviet view was that there had to be fallout, for example, that the radiation so released was reaching the earth's surface. See Treaty Banning Nuclear Testing in the Atmosphere, Oceans, and Outer Space, 480 UNTS 43 (1963). US patrol aircraft routinely picked up air samples containing radionuclides outside the borders of the USSR following one of its test explosions, which routinely led to US charges that the treaty had been violated. These were equally routinely rejected. This was not, in any significant way, a dispute over facts, but rather an ambiguity due to translation difficulties. Under the US interpretation, noncompliance with this provision was widespread, and under the Soviet interpretation, it never happened (or at least the US could never prove it).

³⁰ For example, the deadlines under the CWC for the complete destruction of chemical weapons are proving impossible for Russia to meet, given the magnitude of the task and its limited financial resources. Similarly, for want of new legislation, reporting to the Organisation for the Prohibition of Chemical Weapons ("OPCW") on the US chemical industry has not been accomplished by the treaty's deadline. In contrast, little or nothing must be done by most states to avoid violating the Seabeds Arms Control Agreement, and their forbearance involves no opportunity costs or other losses to national interests.

capacity to comply or not comply that it becomes interesting to examine why the state lives up to its obligations or violates them. For example, all of the nearly two hundred nations in the world comply perfectly with the norm in the Outer Space Treaty not to place nuclear weapons in orbit, whether or not they are a party to that treaty. However, only eight states have deployed functional nuclear weapons to their military forces. Only six countries and a European consortium have ever placed objects in earth orbit, and few of those have experience with precision de-orbiting. Thus, only a tiny handful of countries is currently in a position to place in orbit nuclear weapons that could rapidly de-orbit on command and attack a target. The number that could do so with concerted effort in the next few years is still quite small. The fact, therefore, that for over thirty years, countries like Tonga, Botswana, and Jamaica have not violated that norm sheds no light on the role of international law in multilateral arms control compliance. In contrast, even a single act of noncompliance with that norm by Israel or India in the next decade could have grave consequences. Such noncompliance would signal a serious failure of a binding hard law instrument to restrain dangerous developments.

- Compliance with some provisions of treaties is more important than with others. For example, many states have failed their duty under the NPT to enter into a safeguards agreement with the IAEA. However, this has not been a matter of major international significance, as virtually all those noncomplying states have no nuclear materials or equipment that would trigger the actual application of safeguards.

One could add up all the obligations in an arms control agreement and multiply that number by the number of parties and by the years the treaty has been in force. Adding the result for every other agreement would provide the number of potential violation-years. Subject to data and interpretation limitations, one could also tally all instances of significant noncompliance, including the number of states and duration. This would allow the calculation of a global noncompliance rate. That number would be an exceedingly tiny percentage. But in light of the last two points above, it should be obvious that such a noncompliance percentage would be meaningless. Noncompliance by states actually in a position to violate the core requirements of their arms control obligations and with an incentive to do so is still small, but hardly trivial.

Even though a rigorous scientific study of arms control compliance is not possible, some hypotheses can be put forth. Whether they are correct will require further consideration, but some illustrative examples are possible. While the examples below are all taken from arms control, if the hypotheses are

correct, they should generally be true in varying degrees for most other fields of international relations as well.

A. CIRCUMSTANCES WHERE HARD LAW COMPLIANCE MAY BE BETTER THAN SOFT LAW COMPLIANCE

All things being equal, hard law instruments are likely to have a substantial compliance advantage over soft law in the multilateral arms control context in the following circumstances.

1. Hard law will be superior to soft law where the political risk of being labeled a lawbreaker is higher than the political risk of engaging in legal but disfavored conduct.

In the years immediately prior to the completion of the Comprehensive Test Ban Treaty, China, France, India, and Pakistan were willing to accept the political costs of violating the emerging political and ethical norm against nuclear testing by testing underground, which they had a legal right to do. Yet none was willing to violate the LTBT,³¹ even though they would have obtained more data from open-air tests, which were also much cheaper and faster to conduct. The only plausible explanation is that the leaders of these countries recognized that the rest of the world would have regarded testing in violation of a longstanding arms control and environmental treaty to be considerably worse than the testing per se. Thus, the most important advantage of using a hard law instrument may be that countries fear worse consequences for breaking a legal duty than for failing to live up to a soft law norm.

2. Hard law will be superior to soft law where effective compliance requires intrusive verification, and where that can be achieved only through a treaty instrument.

A critical factor affecting compliance with arms control agreements is the likelihood of being caught in the act of violating the agreement. Violations that can be hidden from plain view, from foreign intelligence activities, and/or from treaty-based verification measures, are more likely to occur than those that have poor prospects of remaining hidden. This probably explains the Soviet Union's extensive violations of the Biological Weapons Convention, which has no verification provisions. Of course, some norms do not require any verification measures to be effective because violations would be obvious or readily

³¹ During the relevant times, China, France, and India were all parties to the LTBT. Pakistan had signed but not ratified the treaty. However, as a signatory, Pakistan arguably had a duty under the law of treaties not to engage in acts that would defeat the object and purpose of a treaty (in the case of the LTBT, not to conduct nuclear tests except underground). See Article 18 of the Vienna Convention, reprinted in 8 ILM at 686 (cited in note 14).

observed by national intelligence means. Examples might be the Outer Space Treaty, the Seabeds Arms Control Agreement, and the Ottawa Landmines Treaty.³² Treaties can also provide that any state party has inspection rights, as is the case with the Antarctica Treaty and the CFE.

It is possible to imagine intrusive verification schemes under a soft law regime, but in arms control there are only a few minor examples. Only hard law has been used where the verification must be performed by an international organization, as is done under the CWC and the NPT. National intelligence will not suffice, because (a) it is easy to hide the materials, since only a few tons of the right chemicals delivered by bomber or missile attack on a crowded city would cause extensive casualties, and far smaller amounts of weapons-usable nuclear material can cause horrific damage,³³ as shown at Hiroshima and Nagasaki; and (b) both nuclear fuel cycle and chemical synthesis facilities can be used for either peaceful or nonpeaceful purposes. This “dual-use” capability means that the mere existence of the facility is not sufficient evidence of nonpeaceful intent. Overcoming these problems requires a high degree of intrusiveness by the Organisation for the Prohibition of Chemical Weapons (“OPCW”) and the IAEA respectively. Such intensive international inspection regimes could not arise out of soft law instruments. Indeed, in the multilateral arms control arena, mutual inspection arising from soft law has only been used in the case of observers at military exercises under the Helsinki accords.

3. Parties are more likely to comply with a hard law treaty than with soft law when compliance is easy, and the incentives to cheat are modest.

The United States has some incentives to station nuclear weapons in Puerto Rico. But it has agreed in Protocol I of the Treaty of Tlatelolco not to do so.³⁴ Its compliance with this duty depends no doubt on the fact that that treaty has been critical to regional nuclear nonproliferation efforts, and also on the belief that the United States should live up to its international legal obligations.

³² While small-scale cheating involving landmines would be very easy, (an antipersonnel landmine is considerably easier to manufacture than a small single-shot rifle), no one is particularly worried about small-scale exports, as the problem with landmines was largely a function of their very widespread use, with several million mines used in some conflicts. In contrast, exports that would be relevant to large-scale landmine use require factories and marketing activities that are difficult to keep hidden. The current alliance of NGOs keeping watch on landmine activities probably suffices for this purpose (though one hears they receive occasional tips from friendly intelligence services). See generally Human Rights Watch, *Landmine Monitor Report 2001: Toward a Mine-Free World* (2001).

³³ For example, less than 10 kilograms of plutonium-239 is enough for a nascent nuclear weapons program to manufacture a 15 kiloton device.

³⁴ See Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, 33 UST 1792 (1981).

But it helps that it is not difficult to comply with the treaty, as the United States has ample other locations for nuclear weapons storage and deployment, and the incentives to cheat are therefore quite modest. But if there were only a soft law norm, there might well be internal pressures to use only military judgments to decide where US nuclear weapons could be deployed. A similar calculus of incentives and alternatives probably explains why there has been no violation of the Seabeds Arms Control Agreement. It might be militarily beneficial for a state to place nuclear weapons on the seabed, but those military benefits are not large enough to outweigh the costs of noncompliance.

4. Compliance may be better with a hard law treaty than with soft law where the law or politics of some states requires a treaty instrument before they can impose duties on nonstate actors.

Humanitarian law's restrictions on certain weaponry as contained in the CCW and its protocols, the Rome Treaty establishing the International Criminal Court, and the nonuse provisions of the Ottawa Landmines Treaty, are all intended to assure that their prohibitions would be binding on everyone: not just governments and their agents, but also on individuals and insurgent groups. In some states, a treaty is preferable for legal reasons since the domestic law of the state places a higher value on treaty obligations than on soft law as a basis for adopting domestic law restrictions on private parties.³⁵ For other states, use of a treaty may make it easier politically to obtain domestic legislation to implement a norm. That factor was instrumental in the US decision to place all US civilian nuclear reactors under IAEA safeguards, and to do so utilizing a separate treaty. The United States considered it important to submit to the safeguards mechanism to show that it was not seeking commercial advantage for its nuclear industry from its status as a nuclear weapon state.³⁶ A separate, non-self-executing treaty assured that there would be prompt implementing legislation.

5. Compliance may be better with hard law treaties because it is easier for treaties to provide sanctions for noncompliance or nonadherence, or to legitimate certain countermeasures.

Formal systems of sanctions for noncompliance in the arms control field are rare, although the NPT has something of an automatic sanction built into

³⁵ This is the case in several European countries and Japan. For example, the nonbinding Nuclear Suppliers Group contains an exception for states that lack the authority to regulate technology not contained in equipment. This provision was put in to accommodate the Swiss. For such states, a treaty obligation may be necessary to bring about the highest level of compliance, even where the executive authorities of a state are willing to comply.

³⁶ Agreement between the United States of America and the International Atomic Energy Agency for the Application of Agency Safeguards in the United States, 32 UST 3059 (1977).

the treaty for parties that violate IAEA safeguards.³⁷ Sanctions for nonparticipation also exist. The CWC in particular forbids export of certain chemicals to non-CWC parties. However, while uncommon, a soft law instrument can achieve the same effect. For example, limitations on the export of ballistic missile equipment and technology apply by their terms to non-NPT parties under the MTCR, a nonbinding, soft law instrument. In effect, the MTCR imposes sanctions on states for pursuing missile or space programs without their becoming a party to the NPT. Thus, the most that can be said in the arms control field is that the treaty instrument makes sanctions for noncompliance and nonparticipation easier, and perhaps more effective. However, such sanctions are uncommon, and in any event the same result can sometimes be achieved under nonbinding instruments.

Finally, a treaty may be necessary to justify the use of countermeasures that would otherwise be illegal. An example would be boarding and searching a ship at sea, an otherwise unlawful action that may be justified if the ship is carrying contraband in violation of a treaty.³⁸ The recent halting by Spanish warships of a North Korean vessel carrying SCUD missiles destined for Yemen, and the subsequent release of the missiles on the grounds that their acquisition by Yemen violated no treaty obligation, shows that this is not merely a hypothetical consideration.

B. CIRCUMSTANCES WHERE THERE MAY BE LITTLE DIFFERENCE IN COMPLIANCE BETWEEN SOFT AND HARD LAW INSTRUMENTS

Because there are so few opportunities for direct comparison, relatively little can be said with certainty as to when compliance with treaties and soft law norms may be equally good—or equally poor. Nevertheless, the following propositions seem to have some support and are worth exploring.

1. Compliance with both treaties and soft law may be poor when the norm is not genuinely accepted by the relevant state.

A state may not accept a norm contained in an instrument to which it subscribes for several reasons. The norm may have been adopted under pressure, and thus never genuinely accepted by the state. A state may consider

³⁷ Under Article III, paragraph 2 of the NPT, a nuclear exporting state must assure itself that IAEA safeguards will apply in the importing state as a condition of the export. NPT, 21 UST at 489 (cited in note 5). If an importing state violated safeguards, the IAEA Director General would no longer be able to certify that safeguards would be effectively carried out in the recipient state. While this sounds a bit abstract, the consequence is that a state dependent on nuclear fuel, reactor parts, or heavy water imports to keep its reactors running would face a virtually automatic cutoff of vital commodities if it violated safeguards.

³⁸ The author is grateful to his colleague, Bernard Oxman, for pointing out this possibility.

an instrument as a whole beneficial, but not a specific provision containing the norm. Alternatively, a state may have accepted the norm initially, but then changed military or political circumstances altered its perception of its vital interests such that it no longer accepts the norm. Sometimes states in these circumstances find it more advantageous to cheat than to legally withdraw. Where that is the case, compliance with a treaty may be very poor, and it is highly improbable that use of a soft law instrument would have yielded better compliance. Iraq apparently entered the NPT in good faith when it ratified the treaty in 1969, but then changed its mind sometime in the 1980s. North Korea entered the NPT in 1985 under very heavy pressure from the Soviet Union as a condition for further nuclear cooperation, but apparently never really accepted the norm.

One should not conclude that a state's pressured adherence to an arms control treaty is worthless. Often a state will eventually come to accept the norm, even if its initial acceptance was reluctantly given. Among OECD countries, Spain was the last non-nuclear-weapon state to adhere to the NPT and many in its military were opposed. Yet these days, following two decades of democratic government, Spain has become a staunch ally in global nonproliferation efforts.

While these examples provide support for the proposition that compliance may be equally bad where a state does not accept a norm, whether that norm is in hard law or soft law, there are reasons to think that a treaty may be superior to soft law in some cases. This benefit can accrue if the terms of the treaty impose duties that are difficult to bypass. Both the Iraqi and North Korean nuclear weapons programs were slowed and rendered considerably more expensive because of the NPT. Iraq and North Korea had to follow strategies for obtaining weapons-useable nuclear materials that avoided both IAEA safeguards on all their nuclear facilities and detection by foreign intelligence services. In Iraq's case, that meant continuing to abide by IAEA safeguards on its declared nuclear facilities, but at the same time creating a secret uranium enrichment program utilizing electromagnetic separation technology. Fortunately for Iraq, the Nuclear Suppliers Guidelines were nearly devoid of detail as to the parts and equipment used in that technology. Focusing on electromagnetic separation made it much less likely that Iraq's purchasing activities would come to international attention. This turned out to be an excellent smuggling strategy, but a poor technological one. Iraq gradually shifted the bulk of its uranium enrichment efforts to the more promising centrifuge technology, but that technology involved a higher risk of detection by intelligence services monitoring the purchasing efforts by Iraqi agents abroad.

2. Compliance with both treaties and soft law instruments may be good when noncompliance is very difficult.

Under the Environmental Modification Treaty (“ENMOD”), it is unlawful for any state to modify natural processes of the earth as a weapon of war.³⁹ Thus, one may not cause tsunamis, hurricanes, changes in ocean currents, etc., for hostile purposes. As no one to date has figured out how to do those things for any purpose, let alone create an effective weapon, compliance with the norm has been perfect, both by parties to ENMOD and by nonparties. This does not mean such a treaty is pointless, as it may make research by the most technologically advanced states on such measures less likely to be approved and funded, thus helping to assure long-term compliance. A soft law instrument might not have as much influence on states’ internal processes.

3. Compliance may be equally good where the norm enjoys very widespread support from governments and concerned publics.

Compliance with both the Ottawa Landmines Treaty’s hard law norm against exporting antipersonnel landmines, and with the soft law UNGA resolutions calling on all states to observe a moratorium on landmine exports, seems to be excellent. While some states, such as the US, Russia, and China, disagree with some of the other norms contained in the treaty and did not become parties to it, they were prepared to accept the soft law norm against export. This norm had exceptionally broad support among the public, as well as among nearly all governments. Similarly, the arms control norms of the Antarctic Treaty have been observed by all states, not just those states party to it.

C. HYPOTHESES COMPARING ONE SOFT LAW NORM WITH ANOTHER

It may be useful to speculate on the circumstances where the chances for compliance with soft law arms control measures might be at their greatest, keeping in mind that the number of examples is limited.

1. Compliance with a soft law norm is likely to be better if it is derivative of, amplifies, or interprets a binding obligation.

Among the most effective instruments are soft law instruments that are not technically binding, but are virtually so because of their relationship to binding norms. A good example of this is IAEA Document INFCIRC 153, which sets forth the content of agreements to be negotiated between an NPT party and the

³⁹ See Environmental Modification Treaty, 31 UST 333 (cited in note 1).

IAEA.⁴⁰ By its terms, it is only a decision of the IAEA Board of Governors and does not purport to govern nations' conduct per se. However, it attains virtually the force of a binding obligation because each non-nuclear-weapon state party is obliged, under Article III, paragraph (4) of the NPT, to enter into a safeguards agreement with the IAEA.⁴¹ Algeria tried to negotiate a safeguards agreement on its research reactor that did not meet the terms of INFCIRC 153. It was rebuffed by the IAEA, and ultimately capitulated.⁴²

2. Compliance with a soft law instrument will be better if it is a part of a complex regime that includes hard law elements, even though the instrument is not derived from that hard law.

Both the Nuclear Suppliers Group and the Missile Technology Control Regime are soft law instruments that involve a tension between high stakes international security considerations and highly lucrative commerce. Compliance by exporters with the NSG, which are part of the highly complex nuclear nonproliferation regime, has apparently been substantially better than compliance with the MTCR, which is entirely self-standing—in other words there is no multilateral treaty limiting ballistic missiles.⁴³

3. Compliance will be better if the soft law norm has a high moral content, or is linked with international endeavors having a very high degree of popular support.

Even when soft law has no juridical relationship to other instruments or institutions, a soft law norm that supports other well-understood and widely supported norms (whether in soft or hard law) can foster compliance. A good

⁴⁰ See *The Structure and Content of Agreements Between the Agency and States Required in Connection With the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc No INFCIRC/153 (June 1972).

⁴¹ NPT, 21 UST at 489 (cited in note 5).

⁴² Compare Article 31 of the Vienna Convention, which declares that the subsequent practice of states shall be taken into account in interpreting a Treaty. Vienna Convention, reprinted in 8 ILM at 691–92 (cited in note 14). See also David Sloss, *It's Not Broken, So Don't Fix It: The International Atomic Energy Agency Safeguards System and the Nuclear Nonproliferation Treaty*, 35 Va J Int L 841, 853 (1995).

⁴³ The US and the Soviet Union entered into treaties regulating both strategic and intermediate nuclear-capable ballistic and cruise missiles, but these were not negotiated as multilateral agreements. The INF has become a multilateral agreement by virtue of the demise of the Soviet Union, as twelve of the successor states have facilities that are relevant to the INF's limitations. See US Dept of State, *Adherence to and Compliance With Arms Control Agreements: 1998 Report Submitted to the Congress*, available online at <<http://www.state.gov/www/global/arms/reports/annual/comp98.html>> (visited Mar 30, 2003). The Lisbon Protocol made the START I agreement a multilateral one for a time. However, Belarus, Kazakhstan, and Ukraine no longer have any ballistic missiles governed by the agreement. See US Dept of State, *START I Aggregate Numbers of Strategic Offensive Arms*, available online at <<http://www.state.gov/t/ac/rls/fs/9075.htm>> (visited Mar 30, 2003).

example of this is the Australia Group, which predates the CWC and has no juridical link to it, but deals with the same problem of exports that might help a chemical weapons program.⁴⁴ Similarly, the MTCR, while legally unrelated to the NPT, nevertheless supports it by its restrictions on provision of assistance in ballistic missiles to states not party to the NPT.

4. Compliance with a soft law norm is more likely when only a small group of states is needed to achieve substantial compliance.

The odds of noncompliance with a soft law norm by at least one state rise as the number of relevant states increases. Although there have been violations of the NSG, the Australia Group, and the MTCR, these soft law instruments have been fairly successful, in part because when they were founded, only a few states were technically capable of providing major assistance to nuclear, chemical, and ballistic missile programs. There was concern that these regimes would become wholly ineffective over time with the emergence of new suppliers. Fortunately, most of the new suppliers have joined the respective clubs.

D. HYPOTHESES CONCERNING UNILATERAL AND PARALLEL RESTRAINT MEASURES AND OTHER NON-LAW MEASURES

Despite the difficulty of defining “compliance” with a nonagreement, it is possible to put forth some hypotheses concerning unilateral and mutual restraint, and certain other non-law measures.

1. Compliance with parallel restraint measures is likely to be poor when a state sees military benefit in noncompliance.

The most famous incident in the multilateral context is the nuclear testing moratorium that began in 1958. After years of failure in trying to negotiate a multilateral nuclear test ban, the Soviets announced a unilateral decision to cease nuclear testing. The US and Britain followed suit shortly thereafter. In August 1961, the Soviets shocked the world by resuming testing. This was widely interpreted at the time as an effort on the Soviets’ part to obtain a unilateral advantage. If so, it was a miscalculation, as the US had anticipated the behavior and resumed its own testing two weeks later.

⁴⁴ See the Australia Group website at <<http://www.australiagroup.net/>> (visited Mar 30, 2003).

2. Compliance with parallel restraint measures is more likely when the military utility of acquiring or deploying a particular armament is modest, and the political costs of noncompliance would be large.⁴⁵

Although presumably all eight states with nuclear weapons are capable of doing so, it appears that no state has deployed nuclear weapons designed to increase radioactive fallout despite talk in an earlier age of “cobalt bombs” (nuclear weapons designed to have a layer of cobalt metal that would absorb neutrons, and thus release a large amount of Co⁶⁰, a long-lived radioactive isotope). It is difficult to say with certainty whether this restraint reflects an understanding of the advantages of mutual abstinence concerning such weapons; a belief that the effects of such weapons are difficult to control and therefore make the weapons of doubtful military utility; a concern over the political implications of development, testing, deployment, and use of such devices; or a recognition that any use of such weapons would almost surely violate customary humanitarian law.⁴⁶ The most likely explanation is that the restraint is the result of a combination of these factors. A similar line of reasoning probably explains why no nation state has deployed “dirty” radiation bombs, (non-nuclear explosive devices that disperse specific radioisotopes or nuclear waste), though well in excess of two-dozen nations are technically capable of manufacturing and deploying them.

VII. IMPLICATIONS FOR THEORY

Far too little data is available to assert any lasting truths as to whether, when, and why nations comply with their multilateral arms control obligations. Moreover, no attempt has been made to broaden the inquiry to other areas of international relations, where the role of law might be quite similar or may differ considerably. Still, the experience with compliance under multilateral arms

⁴⁵ As discussed at note 26, unilateral and parallel restraint measures are more common in the bilateral US–Russian and formerly US–Soviet context. That there are limits to mutual restraint, even in the US–Russian context, can be seen in the strong Russian resistance to the US suggestion that both sides further reduce their strategic arms without negotiating a formal agreement. In the end, Russian insistence on a hard law instrument was accepted by the United States, and incorporated in the Moscow agreement signed by Presidents Bush and Putin. US–Russia Strategic Offensive Reductions Treaty (2002), available online at <<http://www.state.gov/p/eur/rls/or/2002/10471.htm>> (visited Mar 30, 2003).

⁴⁶ The weapons discussed in the text would have less military utility and cause more civilian suffering relative to explosive power than “ordinary” nuclear weapons. See also the decision of the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, UN Doc No A/51/218 (1996), available online at <http://www.dfat.gov.au/intorgs/icj_nuc/unan5a_a.html> (visited Mar 30, 2003), and discussion by Dapo Akande, *Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, 68 Brit YB Intl L 165, 203–11 (1997).

control agreements seems to give more support to some international relations and international law theories than to others.

The available information provides little confirmation of the more extreme versions of the *realpolitik* school of international relations most closely associated in the postwar era with Morgenthau⁴⁷ and Kennan,⁴⁸ and a host of neorealists. It is true that countries do whatever they believe is necessary for their literal survival, but short of that, they generally abide by their multilateral arms control obligations even when doing so goes against their perceived self-interest.

There is support for Thomas Franck's hypothesis that both legitimate and just rules pull toward compliance, but that the combination is stronger than either alone.⁴⁹ In that regard, the nuclear nonproliferation ideal is legitimate, since the NPT was properly adopted as necessary for the safety and order of the international community and virtually every nation in the world is a party to the agreement. But in Franck's terms, it is not a just rule because it promotes or at least tolerates the inequality of states. Many countries with no interest in obtaining nuclear weapons are very vocal in expressing their irritation with the nuclear powers, particularly the US and Russia, for what they construe as inadequate progress toward the eventual elimination of nuclear weapons, a requirement of Article VI of the NPT.⁵⁰ Continued rapid progress toward that goal would reduce the inequality.⁵¹ Of course, it is not plausible that a state would seek to acquire nuclear weapons out of such irritation alone, with no military or political advantages accruing to the state. Certainly none of the three critical NPT holdouts—India, Pakistan and Israel—would become party to the treaty solely because the inequality had been greatly reduced. But the strength of the regime depends not only on the extent of international support, but also the depth of that support, which is something that needs continuous cultivation.

The compliance record in multilateral arms control also suggests partial support for the views of Anne-Marie Slaughter Burley and others, developed primarily in the context of human rights, that international law norms are an outgrowth of liberal domestic society and not simply of national government;⁵² and Harold Koh's corollary hypothesis that the role of international law depends in part on the internalization of international law norms, a process which "embeds international law norms into binding domestic legislation or even

⁴⁷ See Hans J. Morgenthau, *Politics Among Nations* (Knopf 5th ed 1973).

⁴⁸ See George F. Kennan, *American Diplomacy* (Chicago 1984).

⁴⁹ Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford 1990).

⁵⁰ NPT, 21 UST at 490 (cited in note 5).

⁵¹ See Jayantha Dhanapala, *The Relevance of Regimes*, address before the Carnegie International Non-Proliferation Conference in Washington, DC (Nov 15, 2002) (Dhanapala is Under-Secretary General for Disarmament Affairs of the United Nations.).

⁵² See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am J Int'l L 205 (1993).

constitutional law.”⁵³ Such liberal domestic consensus and subsequent internalization ensures that officials will feel compelled to uphold the norms. This process is primarily seen in liberal societies, where it supplements the other reasons for compliance, such as fear of adverse consequences flowing from noncompliance. But the support here is only partial, as most dictatorships comply with multilateral arms control as well. Of course, all of the clear violations of the core provisions of multilateral arms control limitations have been by dictatorial governments. However, the vast majority of nonliberal nations have violated no such norms, though many of them could have. For those states, whose leaders have little reason to be concerned with the domestic law implications of their actions, some other explanation is needed to explain their compliance. The most important reasons for compliance, of course, are politico-military, such as the risk of retaliation by the regime’s enemies. Yet it seems unlikely that such politico-military considerations fully explain the behavior. The most likely supplemental factor is that some dictatorships have an interest in fostering a reputation for reliability in the eyes of other governments, even if they are not directly accountable to their own publics in the same way democratic governments are. In that respect, the data seem to provide support for the compliance hypothesis of theorists such as Hedley Bull and Anthony Arend, with their emphasis on the international community as a social order with shared expectations.⁵⁴

Finally, the data seem to support the author’s view that complex regimes have strengths that simple legal regimes do not have.⁵⁵ In the “toolbox” of diplomats, there is a proper place for treaties with binding legal obligations; for international organizations with roles in inspection, enforcement and/or dispute resolution; for self-standing soft law instruments; for soft law implementing measures that draw their moral support from the treaty obligation even if not themselves legally binding; and for a wide variety of non-law measures including intelligence sharing, export control cooperation, financial assistance, and unilateral and mutual restraint. A strong and active complex regime will have many of these factors interacting at once. Because of the efficacy of such regimes, compliance can be good even in an arena like the spread of nuclear weapons, which is highly controversial, and which touches on vital national security interests in ways that give some countries strong incentives to cheat. Weaker, simpler regimes, such as that for biological weapons, have been experiencing declining effectiveness, even though the international revulsion toward the use of biological weapons remains very strong.

⁵³ Harold H. Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2657 (1997).

⁵⁴ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia 2d ed 1995); Anthony Clark Arend, *Do Legal Rules Matter: International Law and International Politics*, 38 Va.J. Intl L. 107 (1998).

⁵⁵ See Williamson, 28 Cornell Intl L.J. 72 (cited in note 18).

VIII. CONCLUSION

Law is no panacea for the problems that arms control seeks to address, any more than it is for other critical international issues. No matter how much we wish it were so, concluding arms control agreements does not guarantee compliance with them. Yet law is clearly an important factor in compliance with multilateral arms control agreements. Fostering effective, widely-supported complex regimes that utilize a full complement of treaties, modified or supplemented over time to meet changing conditions, and supported with soft law and non-law measures, is one of the few hopes we have for making the world a less dangerous place than it would otherwise be.